88-1033

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NORFOLK & WESTERN RAILWAY COMPANY,
a corporation,
Petitioner,

v.

JOHN E. GARDNER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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December 20, 1988

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QUESTION PRESENTED

Whether the venue provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 56, evince a federal policy against application of *forum non conveniens* to FELA cases filed in state courts.

PARTIES TO THE PROCEEDING

Other respondents, in addition to those in the caption, are listed in the Appendix at 36a-37a.

In accordance with Rule 28.1 of this Court, the corporate affiliates of petitioner are listed in the Appendix at 38a.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The Norfolk and Western Railway Company ("N&W") hereby petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the supreme court (App., *infra*, 1a-22a) is reported at 372 S.E.2d 786 (W. Va. 1988). The opinion of the Circuit Court of Brooke County, West Virginia (App., *infra*, 31a-35a) and the certified questions from the circuit court to the supreme court (App., *infra*, 24a-27a) are not reported.

JURISDICTION

The majority opinion of the supreme court was entered on July 7, 1988. On August 8, 1988, petitioner requested rehearing and reargument. The request for

rehearing and reargument was denied and the court's order was made final on September 22, 1988. App., *infra*, 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Title 45 U.S.C. § 56 (Section 6) provides:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Title 28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

West Virginia Code § 56-9-1 provides, in relevant part:

> A circuit court . . . may on the motion of any party . . . and for good cause shown, order such action, suit, motion or other civil proceeding to be removed, if pending in a circuit court, to any other circuit court . . . [p]rovided, that the judge of such other circuit court in a case of removal from one circuit to another may decline to hear said cause, if, in his opinion, the demands and requirements of his office render it improper or inconvenient for him to do so.

STATEMENT

Respondents are 103 Norfolk and Western Railway employees who filed FELA actions in Brooke County, West Virginia between March 26 and June 11, 1987, seeking damages for occupational hearing loss and/or an

assortment of physical injuries in connection with their employment with petitioner at a variety of locations.[1] Respondents chose to file their claims in Brooke County, a sparsely-populated region in the northern tip of the state, despite the lack of any connection between Brooke County and any of the claims. None of the respondents resides in Brooke County. None was injured in Brooke County. None received medical treatment in Brooke County. And none of the material witnesses resides or works in Brooke County. App., *infra*, 3a-4a. Sixty of the respondents are nonresidents of West Virginia. App., *infra*, 3a. Of the minority of plaintiffs who are West Virginia residents, all reside in the southwestern portion of the State, 200 or more miles from Brooke County.

Petitioner is incorporated and has its principal offices in Virginia. The executive officers of N&W reside in Virginia and the corporation is a wholly owned subsidiary of Norfolk Southern Corporation, also a Virginia corporation. Petitioner owns a few miles of track and associated right-of-way in Brooke County, West Virginia over which it operates one train a day in each direction. Thus, although N&W has no facilities in Brooke County, it is "doing business" there within the meaning of 45 U.S.C. § 56 (Section 6). App., *infra*, 3a.

Petitioner moved to have all non-resident respondents' actions dismissed on the ground of *forum non conveniens*.[2] The Circuit Court of Brooke County issued

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[1] The number of claims is currently 114, all of which are subject to the circuit court's order. However, throughout the petition, petitioner will refer to 103 claims, the number that had been filed as of the supreme court's decision.

[2] Petitioner did not seek dismissal in order to defeat any of the claims on the merits. Petitioner has always been, and continues to be, amenable to suit on these claims in an appropriate and convenient forum. For this reason, petitioner also moved to have the resident claims transferred to more convenient counties within West Virginia.

an opinion and order on September 18, 1987, dismissing the actions of the non-resident plaintiffs. App., *infra*, 31a-35a. The circuit court based its order on the demonstrated cost of entertaining claims that were wholly unrelated to Brooke County. Specifically, the circuit court found that the filed cases would lead to a 33 percent increase in the circuit court's caseload, which would in turn impose costs on the County that it was ill-prepared to absorb. App., *infra*, 35a. According to the trial court, "the costs to the Brooke County Circuit Court are easily understood when cardboard file boxes are used for storage for these case files because the Brooke County Commission cannot afford to budget the purchase of additional metal filing cabinets." *Id.* The circuit court concluded "that some reasonable relationship must be shown so as to maintain an action in Brooke County" and that no such relationship had been shown. *Id.*

On December 2, 1987, the circuit court entered an order denying petitioner's motion to dismiss or transfer the actions of the West Virginia residents[3] and simultaneously issued an order of certification to the supreme court on the issues of *forum non conveniens* and transfer. App., *infra*, 24a-30a. Pursuant to W. Va. Code § 58-5-2, the circuit court, following consultation with the parties, certified six questions concerning 1) the general acceptance of *forum non conveniens* in the State, 2) the factors relevant to *forum non conveniens*, 3) the application of *forum non conveniens* to FELA actions filed in the

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[3] The circuit court's order permitting the claims of resident respondents to proceed was based on its interpretation of the intrastate transfer statute, W. Va. Code § 56-9-1. The supreme court upheld this portion of the order on appeal based on a similar interpretation of state law. Petitioner does not seek review by this Court of the decision as to *resident* respondents.

State and 4) the contours of the intrastate transfer statute, W. Va. Code § 56-9-1.[4]

The supreme court held that the common-law doctrine of *forum non conveniens* is not applicable to FELA claims filed in West Virginia courts "in light of the strong policy favoring the plaintiffs' choice of forum in such cases and in light of the strong policy of *W. Va. Const.* art. III, § 17 providing access to the courts of this State."[5] App., *infra*, 16a. The court thus based its rejection of *forum non conveniens* in this case on its belief that the FELA creates a strong *federal* policy supporting the plaintiff's choice of forum which the State is obligated to respect. In particular, the court below looked to the broad venue provisions of the FELA as establishing such a federal policy. The court's reliance on the FELA in reaching its decision is underscored by the fact that it explicitly limited its holding to FELA cases. App., *infra*, 16a-17a. Accordingly, the court reversed the circuit court's order dismissing the nonresident claims on grounds of *forum non conveniens*.

REASONS FOR GRANTING THE PETITION

The decision of the West Virginia Supreme Court of Appeals—relying upon the venue provisions of the FELA in holding that the doctrine of *forum non conveniens*

[4] The certification order, including the questions, is reproduced in the appendix. App., *infra*, 24a-27a.

[5] There is reason to question the existence of a "strong" state policy opposed to *forum non conveniens* in light of the supreme court's unwillingness to declare that *forum non conveniens* is not applicable to civil cases in general. App., *infra*, 16a-17a. Such opposition is further weakened by the existence of the state's intrastate transfer provision which, in *Hinkle* v. *Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), the supreme court interpreted to overrule a plaintiff's choice of forum in a non-FELA case based on the "other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 751 n.13, quoting *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947).

cannot be applied to actions brought in the state courts of West Virginia under the Act—is in clear conflict with decisions of this Court and the courts of last resort of many other states. As this Court made plain in *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950), although a state court need not apply the doctrine of *forum non conveniens* to an FELA action, if the court would not apply the doctrine in any other civil case, a court cannot decline to apply *forum non conveniens* to FELA cases "because it may deem itself compelled by federal law to reject it." *Id.* at 4.[6] Nevertheless, the court below refused to apply *forum non conveniens* because of the generous venue provisions of the FELA, which the court below believed create a "strong policy favoring the plaintiffs' choice of forum" that the court felt obliged to respect.[7] App., *infra*, 16a. A careful

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[6] In their Petition for Appeal on Certified Questions and their brief before the court below, respondents argued at length that this Court's decision in *Mayfield* was incorrect and that, as a matter of federal law, a state has no right to apply *forum non conveniens* to an FELA case. Petition for Appeal on Certified Questions, Counsel for Non-Resident Appellants and Resident Appellees at 57 (December 28, 1987); Brief of Appellants for Non-Resident Plaintiffs at 61-64 (April 9, 1987).

[7] In addition to relying on this strong "federal policy" favoring the plaintiff's choice of forum in FELA cases, the opinion below also cited the state's policy favoring access to the courts as embodied in W. Va. Const. art. III, § 17. The court's reference to Article III, § 17, does not constitute an adequate and independent state ground for the decision below; the opinion as a whole demonstrates that the court considered both federal and state grounds in reversing the dismissal which was based on *forum non conveniens*. To begin with, the court explicitly limited its holding—that *forum non conveniens* should not be applied by state courts—to FELA cases. App., *infra*, 16a-17a. Moreover, although the opinion discussed the federal question extensively, it devoted only scant attention to the state policy issue, and then only to say that the State has not formally adopted *forum non conveniens* and that the State constitutional provision would not be a bar to the application of *forum non conveniens*. It is thus far from clear that the court below would have found the state policy embodied in the open access provision of the State con-

review of this Court's decisions in this area reveals the fundamental error of that reasoning. In light of the clear conflict between the decision below and the long-standing holdings of this Court on the issue presented, this Court should grant the petition and summarily vacate the decision of the West Virginia Supreme Court.

A. The Decision Below Directly Conflicts With Decisions Of This Court.

Under the controlling decisions of this Court, it is absolutely clear that the generous venue provisions of the FELA do not compel a state to reject the doctrine of *forum non conveniens* in FELA cases. In *Douglas* v. *New York, N.H. & H.R.R.*, 279 U.S. 377 (1929), Justice Holmes, writing for the Court, explained that the FELA "does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so . . . ." *Id.* at 387. The Court went on to say that "there is nothing in the Act of Congress that purports to force a duty upon such [State] Courts [to entertain FELA actions] as against an otherwise valid excuse." *Id.* at 388. In *Douglas*, state law required the state court to dismiss, on the principle of *forum non conveniens*, a

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stitution, by itself, a sufficient ground for rejecting the application of *forum non conveniens*.

In such circumstances, the federal question presented in the petition is properly before this Court. For example, in *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138 (1984), this Court rejected the suggestion that it should not review North Dakota's refusal to entertain a suit brought by an Indian against a non-Indian merely because the respondent claimed that the state supreme court's refusal was based on state law. This Court noted that "[i]f the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Id.* at 152. Finding that it was unclear whether the state court's interpretation of state law rested on a misconception of federal law, this Court proceeded to address the federal question. *See also Michigan* v. *Long*, 463 U.S. 1032 (1983).

cause of action against a foreign corporation brought by any nonresident or any foreign corporation and this Court held that the application of state law was not inconsistent with the FELA.

This interpretation of the FELA was reaffirmed in *Missouri ex rel. Southern Ry.* v. *Mayfield*, *supra*. There the Court held that its intervening decisions in *Baltimore & O.R.R.* v. *Kepner*, 314 U.S. 44 (1941) and *Miles* v. *Illinois Central R.R.*, 315 U.S. 698 (1942), did not limit "the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially . . . ." *Mayfield*, 340 U.S. at 4 (citations omitted).

In the face of these unambiguous declarations by this Court, the decision below was clearly wrong. The venue provisions of the FELA do not evince any *federal* policy, much less a strong one, favoring the plaintiffs' choice of forum in contravention of state law.

Indeed, to the extent a federal policy exists on this issue, it is that a plaintiff's choice of forum is not protected absolutely. Congress' intent on this issue can be readily discerned by looking beyond the venue provisions of the FELA. Congress' adoption of 28 U.S.C. § 1404 (a), which permits the transfer of cases properly filed in one federal court to a more convenient federal court, and which applies to FELA actions,[8] indicates plainly that the convenience of witnesses and the interests of justice are legitimate counterweights to an FELA plaintiff's interest in choosing a forum, particularly when the plaintiff is a nonresident of the forum state.

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[8] *Ex parte Collett*, 337 U.S. 55 (1949) and *Kilpatrick* v. *Texas & P. Ry.*, 337 U.S. 75 (1949).

Moreover, the Court in *Ex parte Collett* explicitly viewed Section 1404(a) as a statutory embodiment of "the doctrine of *forum non conveniens*," 337 U.S. at 56. It therefore would be anomalous to infer from the federal statutory scheme as a whole that there is a federal policy opposed to the application of *forum non conveniens* in cases brought under the FELA in state court.

The fundamental error in the opinion below is its failure to distinguish between venue (where a suit properly can be filed) and an absolute right to pursue a claim in the forum of one's choice. The fact that Congress has supported an FELA plaintiff's "substantial right" (*Boyd* v. *Grand Trunk W.R.R.*, 338 U.S. 263, 266 (1949)) to choose a forum by permitting suits to be filed in any state or district in which the FELA defendant does business, does not in any way suggest that a state court, applying *forum non conveniens*, cannot legitimately and properly decline to hear a particular FELA case which can more appropriately be heard elsewhere.[9]

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[9] *Forum non conveniens* is not fundamentally different from the sort of transfer allowed between federal courts under 28 U.S.C. § 1404(a) or from the intrastate transfer allowed between state courts by W. Va. Code, § 56-9-1. To be sure, *forum non conveniens* results in the dismissal of the claims, whereas transfer does not. It is nevertheless true that a court considering a defendant's motion to dismiss based on *forum non conveniens* has the discretion to insist that the defendant stipulate that he will submit to the jurisdiction of a more convenient forum and will not raise a defense based on the statute of limitations. The result is identical to that achieved by a transfer statute such as W. Va. Code, § 56-9-1. It is for this reason that the Court in *Collett* described the federal transfer statute, 28 U.S.C. § 1404(a) as "render[ing] applicable the doctrine of *forum non conveniens* to actions under the Federal Employers' Liability Act." *Ex parte Collett*, 337 U.S. at 56. Whether claims are to be transferred by a federal court under § 1404(a), or transferred by a State court under a statute similar to § 56-9-1, or dismissed by a State court under the doctrine of *forum non conveniens*, the court will not act unless it is clear that the claims can be pursued in another court which properly has jurisdiction and where venue would be appropriate.

Given that federal law does not establish any, much less a "strong," federal policy against state application of *forum non conveniens* to FELA cases, summary reversal by this Court of the decision below is warranted.

B. The Decision Below Conflicts With Decisions Of Other State Courts Of Last Resort.

Not only does the decision below conflict with decisions of this Court, but it also conflicts with decisions of numerous state courts that have considered the applicability of *forum non conveniens* to FELA actions filed in state court. In contrast to the decision below, these other courts have correctly concluded that Congress' intent in enacting 45 U.S.C. § 56 and 28 U.S.C. § 1404(a) was not to restrict the discretion of an individual state to dismiss an FELA action on *forum non conveniens* grounds. For that reason, review by this Court of the decision below is appropriate.

Two cases illustrate the correct analysis of the federal statutes in this area and highlight the erroneous analysis of the decision below. In *Price* v. *Atchison, T. & S.F. Ry.*, 42 Cal. 2d 577, 268 P.2d 457, *cert. denied*, 348 U.S. 839 (1954), the Supreme Court of California was faced with the same question that faced the West Virginia Supreme Court: whether the doctrine of *forum non conveniens* is applicable to an action brought under the FELA by a nonresident plaintiff against a foreign corporation for injuries occurring in another State. Like the trial court in the present case, the California Supreme Court determined that *forum non conveniens* is appropriate in such a case.

The California court reached this decision based in large measure on its assessment of Congress' intent embodied in 28 U.S.C. § 1404(a). The recognition by Congress that it is appropriate to transfer an FELA case from one federal court to another "for the convenience

of parties and witnesses, in the interest of justice" (*id.*) persuaded the California court that it would be anomalous to deny an equivalent authority to state courts. In the words of the *Price* court:

> [W]e are of the view that the injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this State require that our courts . . . exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere. A contrary policy would result in the anomaly that a federal district court situated in California could in the interest of justice transfer to another district or division an FELA action filed here, whereas regardless of the equities involved State courts would be powerless to decline to exercise jurisdiction over comparable actions brought in those courts. We are persuaded that such a result would be promotive of neither fairness, justice, nor Congressional intent when removal power was bestowed upon the federal district courts.

268 P.2d at 461 (citations omitted). Thus, the court concluded that although the federal statutory scheme and the decisions of this Court do not require States to apply *forum non conveniens* to causes of action arising under the FELA, the federal statutory scheme clearly permits such application in appropriate circumstances.

In *St. Louis-S.F. Ry.* v. *Superior Court*, 276 P.2d 773 (Okla. 1954), the Supreme Court of Oklahoma reached a similar conclusion by similar reasoning: although Congress has created generous venue provisions to support the plaintiff's choice of forum in an FELA case, the federal transfer statute evinces Congress' intent to temper

that choice of forum in cases where enforcement of the choice would be fundamentally unfair.[10]

This is not to suggest that this Court should reverse the decision of the court below on the grounds that federal law *requires* a state to apply *forum non conveniens* to FELA actions. The decisions of this Court are clear that a state is free to apply, or not to apply, *forum non conveniens* to actions filed under the FELA to the same extent as it does to other actions. The fundamental error in the decision below lies in its interpretation of federal law as evincing a federal policy that barred that court from applying *forum non conveniens* to an FELA action in state court. For the reasons articulated by the Supreme Courts of California and Oklahoma, this interpretation is incorrect and, therefore, this Court should decide this case in order to clarify the proper interpretation of the FELA.

C. Consideration Of The Federal Issue By This Court Is Necessary To Prevent Further Erroneous Interpretations Of The FELA Venue Provisions.

Although the Court has spoken clearly on the availability of *forum non conveniens* in FELA actions filed in state courts, it has been nearly 40 years since the issue has been squarely addressed. In the interim, the West Virginia Supreme Court and at least one other state supreme court [11] have misconstrued these decisions and have held that federal statutory policy requires state courts to

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[10] *See also Cotton* v. *Louisville & N.R.R.*, 14 Ill. 2d 144, 152 N.E.2d 385 (1958); *Norman* v. *Norfolk & W. Ry.*, 228 Pa. Super. 319, 323 A.2d 850 (1974); *Anderson* v. *Great Lakes Dredge & Dock Co.*, 411 Mich. 619, 309 N.W.2d 539 (1981) (discussing applicability of *forum non conveniens* to both FELA and Jones Act claims).

[11] The Supreme Court of Montana has similarly misconstrued the federal policy established in 45 U.S.C. § 56. *Labella* v. *Burlington Northern*, 182 Mont. 202, 595 P.2d 1184 (1979).

expend their limited judicial resources to adjudicate FELA disputes that are completely unrelated to that state. Summary reversal of the decision below will correct this misinterpretation, will reinforce this Court's *Mayfield* decision, and will ensure that other state courts, especially trial courts, do not follow the lead of the West Virginia Supreme Court and deny *forum non conveniens* motions as barred by "federal policy."

Moreover, a clear message from this Court will protect state courts, taxpayers, jurors and out-of-state FELA defendants from the very real costs of egregious forum shopping.[12] The ad hoc development of law in the states on this issue deprives FELA plaintiffs and defendants of the certainty which they deserve in order to avoid expending resources litigating the procedural issue of a proper forum rather than the merits of these claims.

In sum, the decision of the Supreme Court of Appeals of West Virginia conflicts with decisions of this Court, is contrary to the considered decisions of numerous state courts of last resort and will contribute to inconsistency in the interpretation of the FELA. Accordingly, this Court should summarily reverse the decision below and remand the case for appropriate disposition.

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[12] The dangers of forum shopping in this area are amply demonstrated by the findings of the trial court in this case: the circuit court judge of Brooke County found that failure to dismiss those claims completely unrelated to Brooke County would result in an increase in the County's caseload by a full 33 percent. App., *infra*, 35a.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below should be vacated and remanded with a direction to determine, as a matter of state law, the applicability of *forum non conveniens* in this case.

Respectfully submitted,

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December 20, 1988

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APPENDICES

APPENDIX A

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. CC977

JOHN E. GARDNER, *et al.*

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
A FOREIGN CORPORATION

Brooke County	Certified questions answered; case remanded for further proceedings.

[Filed July 7, 1988]

McHugh, Chief Justice

Justice Neely and Brotherton dissent, in part, and reserve the right to file a dissenting opinion.

Syllabus

The common-law principle of *forum non conveniens* and the similar state statute on removal of civil proceedings, *W. Va. Code*, 56-9-1 [1939], are not applicable to actions brought in the courts of this State under the Federal Employers' Liability Act, 45 *U.S.C.* §§ 51-60, as amended, in light of the strong policy favoring the plaintiffs' choice of forum in such cases and in light of the strong policy of *W. Va. Const.* art. III, § 17 providing access to the courts of this State.

McHugh, Chief Justice:

This case is before this Court upon certified questions from the Circuit Court of Brooke County, West Virginia ("the trial court").[1] We have reviewed the petition, the

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[1] *See W. Va. R. App. P.* 13; *W. Va. Code*, 58-5-2 [1967]. The latter, in relevant part, provides for certification of "[a]ny question arising upon . . . the venue of the circuit court, . . . [or] upon the jurisdiction of the circuit court of a person[.]" Although both subject matter and personal jurisdiction with respect to the defendant railroad as well as venue under the statute are admitted, this case raises questions regarding (1) the power of a circuit court in this type of case to decline to exercise jurisdiction over a defendant and (2) the power of a circuit court in this type of case to transfer venue.

A circuit court's ruling on the first of these questions, raised by a motion to dismiss the action, is certifiable when such motion is denied but is appealable when such motion is granted. Here, the trial court denied the motion to dismiss the actions with respect to the resident plaintiffs but granted such motion with respect to the nonresident plaintiffs. Accordingly, the latter ruling is not technically certifiable, but appealable. The defendant has not, however, raised this point. This Court will therefore deem the matter pertaining to the nonresident plaintiffs to have been appealed and to have been consolidated with the certified questions pertaining to the resident plaintiffs. *Cf. Shay v. Rinehart & Dennis Co.*, 116 W. Va. 24, 178 S.E. 272 (1935) (order granting motion, under *W. Va. Code*, 56-9-1, as amended, for removal of civil proceedings to another circuit court, is not a final, appealable order but involves mere change of forum without dismissal of action).

trial court's rulings on the certified questions and the briefs and oral argument of counsel. We affirm in part, reverse in part and remand for further proceedings.

I

The plaintiffs below are 103 employees of the defendant railroad, Norfolk and Western Railway Company ("N & W"), a foreign corporation qualified to do business in this State. N & W is incorporated under the laws of the Commonwealth of Virginia and its principal office is located in Roanoke, Virginia. Its chief officer and other officers reside in Virginia. N & W is a wholly owned subsidiary of Norfolk Southern Corporation, also a Virginia corporation. N & W owns 184 acres of land in Brooke County, West Virginia, over which it operates one of its main east-west lines, with the daily passage of its trains. N & W thus admits that it does business in Brooke County, West Virginia, one of the northern counties of this State. It also has facilities in some of the southern counties of this State and in other states.

Sixty of the plaintiffs are nonresidents of West Virginia. Forty-three of the plaintiffs are residents of West Virginia. The resident plaintiffs reside in southern counties of this State, namely, Mercer, McDowell, Mingo, Logan and Wayne Counties. All of the plaintiffs have sustained either traumatic injuries, such as orthopedic injuries, or moderate to severe occupational hearing loss. These injuries allegedly occurred while the plaintiffs were performing their duties as employees of N & W.[2] With respect to the claims involving hearing loss, both the resident and nonresident plaintiffs have been exposed

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[2] The various plaintiffs were employed by N & W either as "railway carmen," constructing, repairing or inspecting railroad cars, or as "maintenance-of-way" employees, constructing, maintaining or repairing tracks, right-of-ways, crossings, yards, bridges and other structures. The plaintiffs were employed throughout the "eastern region" of N & W, consisting of the states of Virginia, West Virginia, Kentucky and Ohio.

throughout their employment with N & W to high level noise pollution from various track machinery, apparently inside and outside West Virginia, although the situs of these injuries is not presently known. The plaintiffs do not allege that they have been exposed to noise pollution in Brooke County, West Virginia. With respect to the claims involving traumatic injuries, nearly all of such injuries occurred outside West Virginia. At least one of the nonresident plaintiffs sustained a traumatic injury in McDowell County, West Virginia, one of the southern counties of this State. None of the traumatic injuries were sustained in Brooke County, West Virginia.

None of the fact witnesses or expert witnesses reside in Brooke County, West Virginia. Some of the expert witnesses reside in other counties of West Virginia, for example, Ohio and Kanawha Counties. N & W has a rule of employment which requires coemployees, who would be fact witneses, to attend court at the direction and expense of N & W.[3]

The plaintiffs brought their actions in the Circuit Court of Brooke County, West Virginia, under the provisions of the Federal Employers' Liability Act ("the FELA"), specifically, 45 *U.S.C.* § 56 (1982), which provides that a FELA case may be brought, among other places, in a federal or state court in any federal district in which the defendant is doing business.[4]

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[3] In addition to West Virginia counsel, the plaintiffs are represented by an Illinois law firm. In addition to West Virginia counsel, the defendant is represented by a Pennsylvania law firm.

The trial court indicated that these 103 cases had increased its caseload by about thirty-three percent. Most cases brought under the Federal Employers' Liability Act are, however, settled before they go to trial. *State ex rel. Burlington N.R.R. v. District Court*, —— Mont. ——, ——, 746 P.2d 1077, 1080 (1987).

[4] 45 *U.S.C.* § 56 (1982) provides in pertinent part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of

The defendant moved to dismiss the actions on the ground of *forum non conveniens*. The trial court, requiring a "reasonable relationship" to be shown so as to maintain the actions in Brooke County, denied the motion to dismiss the actions with respect to those cases in which the plaintiffs were residents of West Virginia but granted the motion to dismiss the actions with respect to those cases in which the plaintiffs were not residents of West Virginia at the time the actions were filed. The trial court, without stating its reasons on the record, subsequently denied the defendant's motion, under *W. Va. Code*, 56-9-1 [1939], to transfer the actions of the West Virginia residents to the circuit courts of the counties in which those plaintiffs resided.[5]

Finally, the trial court, upon motion of the parties, certified questions to this Court concerning (1) the applicability to FELA cases of the common-law principle of dismissing a case because of the selection of a *forum non conveniens* (an inconvenient forum) and (2) the propriety in FELA cases of transferring venue intrastate under a state statute.[6]

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the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

[5] The relevant provisions of *W. Va. Code*, 56-9-1 [1939] state:

A circuit court . . . wherein an action, suit, motion or other civil proceeding is pending, or the judge thereof in vacation, may on the motion of any party, after ten days' notice to the adverse party or his attorney, and for good cause shown, order such action, suit, motion or other civil proceeding to be removed . . . to any other circuit court, . . .: Provided, that the judge of such other circuit court in a case of removal from one circuit to another may decline to hear said cause, if, in his opinion, the demands and requirements of his office render it improper or inconvenient for him to do so.

[6] The trial court submitted to this Court the following certified question:

We agree with the trial court that the FELA actions of the West Virginia residents should not have been dismissed and that their actions should not have been

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1. Whether West Virginia recognizes, or should adopt, the doctrines of 'forum non conveniens'?

A. Whether a Circuit Court, in reference to 'forum non conveniens,' may decline to hear a civil action where the plaintiff is not a resident of this State, where the situs of the accident or occurrence is not in this State, and where the defendant is not incorporated in this State and has its principal place of business in another State?

B. If this State recognizes the doctrine of 'forum non conveniens,' whether it should be applied to Federal Employers' Liability Actions (F.E.L.A.) where the plaintiff's 'substantial right' to choose his forum is governed by federal statute?

C. Whether a Circuit Court should decline to hear actions where the place of plaintiff's residence and of the accident or occurrence is not in this State, but where the plaintiff's chosen forum in West Virginia complies with [the] State statute and where the plaintiff's employment requires him to work in interstate railroad commerce?

2. Whether a Circuit Court, in reference to 'forum non conveniens,' should accept to hear a civil action where the plaintiff is a resident of this State, but not of the forum County, where the situs of the accident or occurrence is not in this State, and [where] the defendant, while doing business in this State, is not incorporated here and has its principal place of business in another State?

If a circuit Court accepts such a civil action as set forth above, whether the Court, pursuant to West Virginia Code § 56-9-1, may transfer the circuit action to the County of plaintiff's residence or where the defendant does the major portion of its work in this State?

For the reasons stated herein it is not necessary to answer each of these questions in order to decide this case. "In a certified case this Court will not consider certified questions not necessary to a decision of the case." Syl. pt. 6, *West Virginia Water Service Co. v. Cunningham*, 143 W. Va. 1, 98 S.E.2d 891 (1957). *See also City of Fairmont v. Retail, Wholesale, & Department Store Union*, 166 W. Va. 1, 3-4, 283 S.E.2d 589, 590-91 (1980): "[U]pon receiving certified questions we retain some flexibility in determining how and to what extent they will be answered."

transferred to the circuit courts of the counties in which those plaintiffs resided at the time the actions were brought. We disagree with the trial court's ruling that the FELA actions of the nonresident plaintiffs should have been dismissed. In short, all of the actions should be heard by the Circuit Court of Brooke County, West Virginia.

II

A.

Originally, the venue of an action under the Federal Employers' Liability Act ("the FELA"), 45 *U.S.C.* §§ 51-60 (1982), was limited by a general federal venue statute to the federal district(s) in which the defendant was an "inhabitant." *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44, 49, 62 S. Ct. 6, 8, 86 L. Ed. 28, 31 (1941). Since 1910, a special federal venue statute for FELA actions, now codified as 45 *U.S.C.* § 56 (1982), *see supra* note 4, provides for venue in a federal or state court in the federal district(s) in which (1) the defendant resides, or (2) does business or (3) the cause of action arose. Thus, a FELA action is without question transitory. The language of the special federal venue statute for FELA actions was deliberately chosen to enable the plaintiff to bring a FELA action against the defendant at *any* place in *any* state where the defendant is actually carrying on business, if the plaintiff chooses to file his action there. *Id.* at 50, 62 S. Ct. at 8, 86 L. Ed. at 31-32.

In 1947, Congress *rejected* a proposed amendment to the FELA venue statute which would have limited venue to the federal district(s) in which the plaintiff resided or in which the cause of action arose; under this rejected amendment, only if process could not be served in either of the above places could an action be brought where the defendant was doing business.

The Supreme Court of the United States has stated: "The right to select the forum granted in [45 *U.S.C.* § 56] is a substantial right." *Boyd v. Grand Trunk W.R.R.*, 338 U.S. 263, 266, 70 S. Ct. 26, 28, 94 L. Ed. 55, 58 (1949).[7]

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[7] There is a line of cases decided by the Supreme Court of the United States involving the FELA venue statute but not directly involving the concept of *forum non conveniens*. In *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28 (1941), it was held that a state court in the state of the plaintiff's residence may not enjoin, as vexatious, a FELA action brought by the plaintiff in another state in a federal court having jurisdiction over the defendant and venue. Similarly, in *Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 62 S. Ct. 827, 86 L. Ed. 1129 (1942), it was held that a state court in the state of the plaintiff's residence may not enjoin, as vexatious, a FELA action brought by the plaintiff in another state in a state court having jurisdiction over the defendant and venue.

In 1948, Congress enacted legislation, now codified as 28 *U.S.C.* § 1404(a) (1982). It provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The legislative history of this statute indicates that it permits a transfer of a case from one federal court to another federal court upon a lesser showing of inconvenience than is necessary for a dismissal of a case under the common-law principle of *forum non conveniens*. *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S. Ct. 544, 99 L. Ed. 789 (1955).

This statute was held to be applicable to FELA actions in *Ex parte Collett*, 337 U.S. 55, 69 S. Ct. 944, 93 L. Ed. 1207 (1949), and in *Kilpatrick v. Texas & P. Ry.*, 337 U.S. 75, 69 S. Ct. 953, 93 L. Ed. 1223 (1949). In so holding, the Supreme Court of the United States distinguished between the venue provisions of 45 *U.S.C.* § 56, which deal with the places where FELA actions may be brought initially, and the transfer provisions of 28 *U.S.C.* § 1404(a), which deal with the right to transfer an action properly brought.

Finally, the Supreme Court of the United States, in *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 73 S. Ct. 749, 97 L. Ed. 1094 (1953), expressly reaffirmed *Miles* and held that a state court in the state of the plaintiff's residence may not enjoin, as vexatious, a FELA action brought by the plaintiff in another state in a state court having jurisdiction over the defendant and venue. The court ruled that the enactment of 28 *U.S.C.* § 1404(a), after *Miles*, had

In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), the leading case on *forum non conveniens*, but *not* involving a FELA action, the court made this remark:

> It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it.

330 U.S. at 505, 67 S. Ct. at 841, 91 L. Ed. at 1061, *citing Kepner* and *Miles*, *see supra* note 7, which actually involved collateral attacks on venue by seeking injunctions from other courts. Moreover, transfers of FELA actions may now be made in federal courts under 28 *U.S.C.* § 1404(a), enacted in 1948, after *Gilbert*.

In contrast to this *dictum* in *Gilbert* are the holdings in two FELA cases, namely, *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 49 S. Ct. 355, 73 L. Ed. 747 (1929), and *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1, 95 L. Ed. 3 (1950). In *Douglas*, Mr. Justice Holmes, writing for the court, held that the FELA "does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned." 279 U.S. at 387, 49 S. Ct. at 356, 73 L. Ed. at 752. "[T]here is nothing in the Act of Congress that purports to force a duty upon such [state]

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no effect on *Miles* because 28 *U.S.C.* § 1404(a) applies only to federal, not state, courts and deals only with transfer of actions by the forum court, not with injunctive powers of another court.

Pope was decided after *Mayfield*, discussed *infra* in the body of this opinion, but *Pope* apparently did not undermine *Mayfield*. *Pope*, unlike *Mayfield*, did not involve the power of a forum court to decline to exercise jurisdiction, in a FELA case, under the principle of *forum non conveniens*.

Courts [to entertain FELA actions] as against an otherwise valid excuse [, such as a state statute construed to allow a court to dismiss, under the principle of *forum non conveniens*, any foreign cause of action against a foreign corporation brought by any nonresident or by another foreign corporation]." *Id.* at 388, 49 S. Ct. at 356, 73 L. Ed. at 752.

The *Douglas* court also held that a state, with respect to access to its courts, may, without offending the privileges-and-immunities clause, distinguish between residents and nonresidents, as long as nonresident citizens of the state and nonresident noncitizens are treated the same.[8] "A distinction of privileges according to residence

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[8] The privileges-and-immunities clause is set forth in the *U.S. Const.* art IV, § 2, cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause by its terms relates to protecting persons in their capacity as citizens of other states. In comparison, *U.S. Const.* amend. XIV, § 1 by its terms relates to protecting persons in their capacity as citizens of this nation: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]"

Due to our disposition of this case in favor of the nonresident, as well as West Virginia resident, plaintiffs on the ground that *forum non conveniens* and *W. Va. Code*, 56-9-1 [1939] do not apply to FELA actions brought in the courts of this State, this Court need not determine whether the trial court's ruling, in favor of the West Virginia resident plaintiffs and adverse to the nonresident plaintiffs, is violative of the privileges-and-immunities clause. The trial court did not explain on the record why the actions of the West Virginia resident plaintiffs, none of whom resided in the forum county, Brooke County, West Virginia, had a "reasonable relationship" with Brooke County, while the actions of the plaintiffs residing outside West Virginia did not have such a relationship. The ruling may be impermissibly discriminatory against nonresidents of this State.

Douglas and *Mayfield* allow a state to prefer its residents in access to the courts of the state. We need not decide in the present case if *Douglas* and *Mayfield* have been affected by recent opinions of the Supreme Court of the United States on the privileges-and-

[as opposed to citizenship] may be based upon rational considerations . . . . There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." *Id.* at 387, 49 S. Ct. at 356, 73 L. Ed. at 352.

In *Mayfield*, Mr. Justice Frankfurter, writing for the court, held that "neither of these cases [*Kepner* and *Miles*, *see supra* note 7] limited the power of a State to deny access to *its* courts to persons seeking recovery under the Federal Employers' Liabiilty Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially[.]" 340 U.S. at 4, 71 S. Ct. at 3, 95 L. Ed. at 8 (emphasis added). By "impartial" enforcement of a state policy with respect to *forum non conveniens*, the court meant enforcement "so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution." *Id.*

Mr. Justice Jackson, providing the decisive vote in the five-to-four *Mayfield* decision, stated in his concurring opinion: "Certainly a State is under no *obligation* to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Govern-

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immunities clause, such as *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985), involving residency requirements for the practice of law. *Piper* holds that the privileges-and-immunities clause "does not preclude discrimination against nonresidents [of the state] where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* at 284, 105 S. Ct. at 1278, 84 L. Ed. 2d at 213. *See also Sargus v. West Virginia Board of Law Examiners*, —— W. Va. ——, 294 S.E.2d 440 (1982) (residency requirements for admission to bar examination violates privileges-and-immunities clause; insufficient justification offered for discrimination).

ment, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case." *Id.* at 6, 71 S. Ct. at 3-4, 95 L. Ed. at 9 (emphasis added).

Relying upon *Douglas*, the *Mayfield* court held that the states were not precluded from applying the principle of *forum non conveniens* to FELA actions merely because the FELA empowers state courts to entertain suits arising under it. Instead, "[a]ccording to its own notions of *procedural* policy, a State may reject, as it may accept, the doctrine [of *forum non conveniens*] for all causes of action begun in its courts." *Id.* at 3, 71 S. Ct. at 2, 95 L. Ed. at 7 (emphasis added).

B.

West Virginia is one of only ten states which has not expressly adopted the common-law principle of *forum non conveniens*. *See Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 126 n.3, 519 N.E.2d 370, 372 n.3 (1988). *See also* Comment, *Procedure—Intrastate Application of Forum Non Conveniens*, 70 W. Va. L. Rev. 249 (1967-68). The common-law principle of *forum non conveniens* is simply that a court may, in its sound discretion, decline to exercise jurisdiction, to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 842, 91 L. Ed. 1055, 1062 (1947). *See also Black's Law Dictionary* 589 (5th ed. 1979). The common-law principle of *forum non conveniens* is applicable only if, as a threshold matter, the forum court has jurisdiction and venue is proper under the statute. *Gilbert*, 330 U.S. at 504, 67 S. Ct. at 841, 91 L. Ed. at 1060. "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process;

the doctrine furnishes criteria for choice between them." *Id.* at 506-07, 67 S. Ct. at 842, 91 L. Ed. at 1061.

According to *Gilbert*, the criteria to be considered in deciding whether to dismiss a case under the common-law principle of *forum non conveniens* fall into two general categories, specifically, the private interests of the litigants and the interests of the public. Included among the private interests of the litigants are: the relative ease of access to sources of proof; the availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses; the possibility of a view of property, if such a view would be appropriate in the action; the enforcibility of any judgment; and all other practical problems that make a trial of a case easy, expeditious and inexpensive.

The public interests include the relative congestion of the respective courts' dockets; the burden of imposing jury duty upon the citizens of a community which has no or very little relation to the litigation; the local interest in having localized controversies decided at home; and the advantages of conducting a trial in a forum familiar with the applicable law and of avoiding conflicts of law. *Gilbert*, 330 U.S. at 508-09, 67 S. Ct. at 843, 91 L. Ed. at 1062-63.

Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Id.* at 508, 67 S. Ct. at 843, 91 L. Ed. at 1062. On the other hand, a nonresident plaintiff's choice of forum deserves less deference than that of a resident plaintiff. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56, 102 S. Ct. 252, 266, 70 L. Ed. 2d 419, 435-36 (1981). "[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527, 67 S. Ct. 828, 833, 91 L. Ed. 1067, 1076 (1947).

If the forum court has determined that the alternate forum is more convenient and that the ends of justice will be promoted by trial in the alternate forum, the common-law principle of *forum non conveniens* requires the forum court to dismiss the case, not merely transfer or "remove" it to another court. The dismissal normally will be conditioned upon, *inter alia*, the defendant's agreement to waive the defense of the running of the statute of limitations. *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 127, 519 N.E.2d 370, 374 (1988) and cases cited there.

In the State of West Virginia a circuit court may, upon motion and for "good cause" shown, order a civil proceeding to be "removed" to another circuit court. *W. Va. Code*, 56-9-1 [1939], *see supra* note 5. This Court has not been confronted with a case requiring a decision on whether the "good cause" of *W. Va. Code*, 56-9-1 [1939] is coextensive with, more restrictive than or broader than, the common-law principle of *forum non conveniens*, and, for the reasons stated *infra*, we need not decide that question here.[9] It is clear, however, that *W. Va. Code*, 56-9-1 [1939] authorizes a circuit court to "remove" or transfer, not dismiss, a civil proceeding, and that such statute is "a viable counterpart to" the federal statute on transfer of venue, 28 *U.S.C.* § 1404(a) (1982), *see supra* note 7. *Hinkle v. Black*, 164 W. Va. 112, 124 n.13, 262 S.E.2d 744, 751 n.13 (1979).[10]

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[9] This Court, in discussing *W. Va. Code*, 56-9-1 [1939], recently referred generally to the "probable disadvantage or inconvenience" to the defendants of the case being tried in the forum selected by the plaintiffs. *State ex rel. Kenamond v. Warmuth*, —— W. Va. ——, ——, 366 S.E.2d 738, 742 (1988). The definition of "good cause" within the meaning of this statute was not, however, an issue before the Court in that case.

[10] *W. Va. Code*, 56-1-1, the general venue statute in this State, was amended in 1986 to, *inter alia*, add subsection (b):

> (b) Whenever a civil action or proceeding is brought in the county wherein the cause of action arose, under the provisions

C.

Another consideration relevant to the question of whether this Court should recognize the common-law principle of *forum non conveniens* is the "access-to-courts" or "open courts" provision of our State *Constitution*: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." *W. Va. Const.* art. III, § 17. Other courts have held that their "access-to-courts" or "open courts" constitutional provisions are not an absolute bar to the adoption of the common-law principle of *forum non conveniens*. *See, e.g., Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 132, 519 N.E.2d 370, 378 (1988): "The right of 'every person' to bring an action in an Ohio court is not an unlimited, absolute guarantee that every cognizable claim filed in a court of general jurisdiction will be litigated to a final conclusion in such court." Instead, "[l]itigants may find their claims barred . . . by any number of . . . devices consonant with . . . 'due course of law.'" *Id.*

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of subsection (a) of this section, if no defendant resides in such county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county wherein one or more of the defendants resides, and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by such change of venue, the court may grant such motion.

This statute is not applicable to the present case because venue here was not based upon where the cause of action arose but upon where the defendant was doing business.

We also note that *W. Va. R. Civ. P.* 42(b) authorizes a circuit court in certain circumstances to order actions transferred *to it*. This procedural rule is obviously not involved in this case.

D.

Based upon the foregoing discussion, we recognize that federal law does not require this Court to reject or accept the common-law principle of *forum non conveniens* in FELA actions. We also recognize that our "access-to-courts" or "open courts" constitutional provisions, *W. Va. Const.* art. III, § 17, is not an absolute bar to our adoption of the common-law principle of *forum non conveniens*. Nonetheless, this Court holds that the common-law principle of *forum non conveniens* and the similar state statute on removal of civil proceedings, *W. Va. Code*, 56-9-1 [1939], are not applicable to actions brought in the courts of this State under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, as amended, in light of the strong policy favoring the plaintiffs' choice of forum in such cases and in light of the strong policy of *W. Va. Const.* art. III, § 17 providing access to the courts of this State. This identical approach has been taken elsewhere. *Labella v. Burlington Northern, Inc.*, 182 Mont. 202, 595 P.2d 1184 (1979), *followed in Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979), and *State ex rel. Burlington N.R.R. v. District Court*, —— Mont. ——, 746 P.2d 1077 (1987). *See generally* annotation, *Power of State or State Court to Decline Jurisdiction of Action Under Federal Employers' Liability Act*, 43 A.L.R.2d 774 (1955 and Later Case Service); *cf.* annotation, *Forum Non Conveniens: Circumstances Justifying State Court's Refusal to Take Jurisdiction of Federal Employers' Liability Act Proceeding*, 60 A.L.R.3d 964 (1974) (collecting cases assuming the power to invoke the principle of *forum non conveniens* in FELA actions and analyzing the circumstances justifying, or not justifying, dismissals of FELA actions under such principle).

Our decision is a narrow one. Our holding herein does not deny or recognize the applicability of the common-

law principle of *forum non conveniens* to cases not brought under the Federal Employers' Liability Act.[11]

For the foregoing reasons this case is remanded to the Circuit Court of Brooke County, West Virginia, for further proceedings in all of the FELA actions brought therein by the resident and nonresident plaintiffs.

Certified questions answered;
case remanded for
further proceedings.

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[11] The *Mayfield* case, discussed in subsection II.A of this opinion, held that a state may accept or reject the principle of *forum non conveniens* according to the state's notions of *procedural* policy. *W. Va. Const.* art. VIII, § 3 empowers this Court to "promulgate rules . . . relating to . . . practice and procedure[.]" *W. Va. Code*, 51-1-4 [1935] provides for a certain procedure, including an opportunity for certain persons to request a hearing, in order for rules governing pleading, practice and procedure to become effective. The current vitality of this portion of this statute is a question which need not be addressed here.

Neely, Justice dissenting in part:

The majority opinion is so thoroughly researched and so well written that a long dissent is unnecessary. As the majority correctly concedes, the decision in this case is based entirely upon a policy decision by this Court that non-taxpayer, out-of-state railway workers shall be able to use the fora of this State to litigate FELA cases when they find a defendant doing business here.

First I would point out the obvious: this is a context specific decision. This case does not preclude circuit courts in other cases from applying the doctrine of *forum non conveniens*. Furthermore, there was no well developed factual record before us concerning the effect of large numbers of foreign FELA cases on the docket of the Brooke County Circuit Court. Given that the majority in this case is narrow, I believe it entirely appropriate to raise the issue again even with respect to FELA cases, when a good factual record concerning the implications of mass tort litigation on the local docket can be presented. I dissent because I believe that opening the courts of this state to mass tort litigation by foreign plaintiffs who have no contacts here is eminently ill-advised.

I

Under *W.Va. Const.* art. VI, § 51 relating to the State budget, which says, "[p]rovided, that no item relating to the judiciary shall be decreased . . ." West Virginia has the best funded state court system in the United States. Although the salary of judges and their numbers are set by the legislature, the number of supporting personnel and the level of logistical support for the courts are entirely within the discretion of the West Virginia Supreme Court of Appeals. Unlike many other states that have clogged dockets because of deliberate political decisions to undermine the courts because they are engines for the redistribution of wealth, this State is blessed with adequate judicial machinery for our current

needs. In most circuits jury trials can be had almost immediately if the parties are ready.

Although the average West Virginia court user will find legitimate grounds to complain about our system, in comparison to other systems, our system works reasonably well. But it is the residents of this State who have paid for our system and it is now out-of-state, nontaxpaying plaintiffs who seek to use it. Much as I would like to bring the blessings of West Virginia's judicial system to all mankind, a court system is little different from a Kroger store: if a Kroger store gives away meat and vegetables to people who can't pay, there will soon be no meat and vegetables for the paying customers.

Throughout a free economy the price system is usually the mechanism chosen to regulate the allocation of scarce goods and services. When a good or service is in high demand but short supply, the price goes up and users with the least urgent need or the least money drop out of the market. Price-system rationing, however, presents a significant equity problem: those with the most money get the most goods and services. Consequently, when necessities of life are in short supply, like food during World War II or medicine during an epidemic, there is broad social resistance to allowing price-system rationing. Certainly we have even greater reservations about the equity of price-system rationing in the civil justice system.

Because there is no price-system rationing in the civil justice system, courts are like a traditional common in an English agricultural village where everyone has the right to graze livestock on the pasturage held in common. Any rational farmer will graze all his sheep or cattle on the common, notwithstanding that if everyone does the same thing the common will degenerate, and everyone's livestock will suffer from malnutrition. Any time a good or service is provided free of charge, it is in everyone's interest to get as much as he can because he cannot ex-

pect his own forebearance to be followed by everyone else's. That is why in such circumstances explicit regulation is required, like the fish and game laws that every state now enforces to ensure that wildlife will not be hunted to extinction. It is also the rationale for the doctrine of *forum non conveniens* in state courts.

Every time demand for a good or service exceeds supply, some rationing system, either price or non-price, will go into effect. In the case of the unregulated and thus overused common, the quality of the pasture degenerates to such an extent that the weaker livestock die and leave enough for those who are strong enough to survive. It is merely luck whether a farmer has a strong or weak cow; if farmers keep replenishing the livestock that die so that more of them continue to die, then the farmers who are the last to run out of money to buy livestock ultimately get the benefit of the whole common. That is not a very intelligent system of rationing but it is *a* system of rationing nonetheless.

In the communist world, particularly Russia, rationing is accomplished by the political authorities. The "bidding up of prices" is not done in the monetary currency but rather in the political currency. Those with influence and official positions can shop in special stores that have stocks of essential goods. Regular stores charge the same price as the special stores, but the regular stores never have any goods to sell.

When neither the price-system nor the political system is allowed to ration, however, then goods and services will be rationed by other natural mechanisms. The most common of these mechanisms in the United States is standing in line. We apply this rationing system to tickets to rock concerts, tickets to the West Virginia-Penn State game, and to our courts.

Litigants can take as much of the goods and services of the courts as they want when their turn comes up.

In most places, of course, their turn doesn't come up very often because of the length of the queue. That's why the plaintiffs before us are coming here. Unfortunately, the people who can afford to stand in line the longest are not necessarily the people who have the most urgent need to litigate, yet our egalitarian tradition prohibits the sale of one's place in line to someone with a more pressing need for court services.

What concerns me, then, about the case before us is that the litigation of out-of-state FELA cases may well cause delay for local residents with urgent domestic problems, important contract matters (delay in the decision of which may lead to local bankruptcies) and serious personal injuries where the litigants may be destitute until some court awards them a judgment. In addition, it should be remembered that Brooke County has a population of only 31,117 people, which means that if a great deal of out-of-state tort litigation is conducted there, calls to jury duty may become unduly burdensome. It is one thing to say that jury duty is an obligation of citizenship with regard to deciding the disputes within one's community; it is quite another to impose this involuntary servitude for the benefit of total strangers, the courts of whose states would not return the favor.

II

Finally, I would point out that Judge Robert Merhige of the United States District Court for the Eastern District of Virginia and Judge Thomas D. Lambros of the United States District Court for the Eastern District of Ohio have devised superb mechanisms for handling mass tort litigation that place the additional costs of such litigation squarely upon the shoulders of the litigants.[1]

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[1] Judge Lambros, at my request, has been kind enough to forward to us all of the form orders, discovery procedures, special master appointment orders, and other material necessary to set up machin-

It seems perfectly reasonable to me that if we are to offer our fora to out-of-state litigants, the least that they can do is underwrite some of the extra costs associated with their litigation that would otherwise be borne by our taxpayers. Such mechanisms as privately paid special masters, privately paid advisory juries to assist in determining damages for court supervised settlements, and other litigant-financed contributions to the courts' logistical support all seem to me entirely appropriate.

I am authorized to say that Justice Brotherton joins with me in this dissent.

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ery similar to that now used in mass tort cases in the U.S. district courts. This material is available to our judges and lawyers through the West Virginia Supreme Court of Appeals library.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charlestown, Kanawha County, on the 22nd day of September, 1988, the following order was made and entered.

CC977

JOHN E. GARDNER, *et al.*,
Plaintiffs Below

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,
Defendant Below

The Court having maturely considered the petition for rehearing and reargument filed in the above-captioned case is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest /s/ April H. Ramsey
Clerk
Supreme Court of Appeals

APPENDIX C

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Actions Numbered:

87-C-84 THROUGH 99
87-C-121 THROUGH 122
87-C-148 THROUGH 178
87-C-184 THROUGH 198
87-C-220 THROUGH 265 and
87-C-280

JOHN E. GARDNER, *et al.*,
Plaintiffs,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
a corporation,
Defendant.

CERTIFIED QUESTION ORDER TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Whereas, this Court finds that the above-styled civil action has raised questions of law for which there are no specific controlling precedent in West Virginia case law, it is hereby

ORDERED upon this Court's own motion and the joint application of the parties herein that the following questions be certified to the West Virginia Supreme Court of Appeals pursuant to West Virginia Code § 58-5-2.

1. Whether West Virginia recognizes, or should adopt, the doctrines of "forum non conveniens?"

A. Whether a Circuit Court, in reference to "forum non conveniens," may decline to hear a civil action where the plaintiff is not a resident of this State, where the situs of the accident or occurrence is not in this State, and where the defendant is not incorporated in this State and has its principal place of business in another State?

B. If this State recognizes the doctrine of "forum non conveniens", whether it should be applied to Federal Employers' Liability Actions (F.E.L.A.) where the plaintiff's "substantial right" to choose his forum is governed by federal statute?

C. Whether a Circuit Court should decline to hear actions where the place of plaintiff's residence and of the accident or occurrence is not in this State, but where the plaintiff's chosen forum in West Virginia complies with State statute and where the plaintiff's employment requires him to work in interstate railroad commerce?

2. Whether a Circuit Court, in reference to "forum non conveniens," should accept to hear a civil action where the plaintiff is a resident of this State, but not of the forum County, where the situs of the accident or occurrence is not in this State, and whether the defendant, while doing business in this State, is not incorporated here and has its principal place of business in another State.

A. If a Circuit Court accepts such a civil action as set forth above, whether the Court, pursuant to West Virginia Code § 56-9-1, may transfer the circuit action to the County of plaintiff's residence or where the defendant does the major portion of its work in this State.

By Opinion and Order entered on September 18, 1987, a copy of which is attached hereto, the Court, in requiring a reasonable relationship be shown so as to maintain these actions in Brooke County, held that the actions of the West Virginia plaintiffs could be maintained and that the actions of the non-resident plaintiffs be dismissed.

By Order entered on December 2, 1987, a copy of which is attached, the Court denied the defendant's motion to transfer the actions of the West Virginia residents in reference to West Virginia Code § 56-9-1.

In accordance with Rule 13 of the Rules of Appellate Procedure, it is also hereby

ORDERED:

1. That the plaintiff shall, within thirty (30) days of the date of the entry of the above Order of Certification, file with the Circuit Clerk the original and seven (7) copies of a petition and note of argument as provided for by Rule 3(c) of the Rules of Appellate Procedure, a copy of which shall be served upon the defendant.

2. That the defendant shall file a note of argument in opposition with the Circuit Clerk within thirty (30) days of the filing of plaintiff's petition.

3. That the plaintiff at the time of filing the petition, shall also file with the Circuit Clerk, serving upon the defendant, a designation of the record as is necessary to determine the issues certified.

4. That the defendant shall have fifteen (15) days after the date of receipt of such designation to designate such additional portions of the record as is necessary for determination of the issues certified.

5. Within thirty (30) days of the designation of the parties, the Circuit Clerk shall assemble, paginate, and index the designated portion of the record, and, together with the original and copies of the petition and opposing

note of argument, if submitted, transmit the same to the Clerk of the Supreme Court of Appeals for filing.

ENTERED this *2d* day of December, 1987.

/s/ W. Craig Broadwater
Judge

APPENDIX D

IN THE CIRCUIT COURT OF BROOKE COUNTY,
WEST VIRGINIA

Civil Actions Numbered:

87-C-94 THROUGH 99;
87-C-121 THROUGH 122
87-C-148 THROUGH 178
87-C-184 THROUGH 198
87-C-220 THROUGH 265 and
87-C-280, 87-C-421
87-C-422, 87-C-424

JOHN E. GARDNER, *et al.*,
Plaintiffs,

vs.

NORFOLK & WESTERN RAILWAY COMPANY,
a corporation,
Defendant.

ORDER

The 25th day of November, 1987, came the Plaintiffs, by Jeremy C. McCamic, of their counsel, and came the Defendant, by Cathy M. Armstrong, of its counsel, pursuant to the Court's setting this day for a status conference in the above matters.

Whereupon, the Court reviewed its Opinion and Order entered the 18th day of September, 1987, covering the proceedings had in the above Civil Actions on the 24th

day of July, 1987, and reviewed the oral motion of counsel for the Defendant made at the proceedings held in these Civil Actions on October 9, 1987, to transfer the above Civil Actions brought by West Virginia residents to the counties of their residence under the authority of W.Va. Code § 56-9-1 and is of the opinion to deny same, and it is therefore

ORDERED that said oral motion to transfer the above Civil Actions brought by West Virginia residents to the counties of their residence be and it is hereby denied, exception to the Defendant.

Whereupon, the Court considered the Defendant's written motions heretofore filed to dismiss or in the alternative to transfer the above Civil Actions brought by residents of West Virginia and is of the opinion to deny same, and it is therefore

ORDERED that Defendant's Motion to Dismiss or in the Alternative to Transfer those cases brought by West Virginia residents are and they are hereby denied, exception to the Defendant.

Whereupon, the Court considered the question of certification and stated to counsel that the Court would, in the very near future, enter an order certifying a question on the issue of forum non conveniens concerning the above Civil Actions brought by Plaintiffs not residents of West Virginia and a question on the issue of forum non conveniens, including the issue of transfer pursuant to W.Va. Code § 56-9-1, concerning Civil Actions brought by West Virginia residents, and it is therefore

ORDERED that Plaintiffs' Motion to Supplement Record be and it is hereby granted, exception to Defendant, and it is further

ORDERED that Plaintiffs' Motion to Compel Answers to Interrogatories and Request for Production heretofore filed in the above Civil Actions wherein the Plaintiffs are

West Virginia residents are hereby granted, with Defendant given 30 days from this date to comply, exception to the Defendant.

ENTER: 2 December 1987

/s/ W. Craig Broadwater
Judge

Approved for Entry:

/s/ J.C. McCamic
Of Counsel for Plaintiffs

/s/ Cathy M. Armstrong
Of Counsel for Defendant

APPENDIX E

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Actions Numbered:
87-C-94 through 99
87-C-121 through 122
87-C-148 through 178
87-C-184 through 198
87-C-220 through 265 and
87-C-280

JOHN E. GARDNER, *et al.*,
Plaintiffs,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
a corporation,
Defendant.

OPINION AND ORDER

On the 24th day of July, 1987, respective motions of the parties were argued before the Court. The Court considered the defendant's motion to dismiss made pursuant to Rule 12(b) and its supporting memoranda of law. As well, the Court considered the plaintiffs' motion to strike made pursuant to Rule 12(f) and his supporting memoranda. Inasmuch as these motions are directly relevant to the above-numbered civil actions, the rulings herein will be applicable thereto.

Counsel for plaintiffs submitted several exhibits for consideration at the hearings. These exhibits included:

Exhibit #1

W.Va. Secretary of State letter recognizing defendant as doing business in W.Va. from 1896 to 1987;

Exhibit #

Affidavit of Brooke County Assessor that defendant owns 184 acres in Brooke County

Exhibit# 3, 4, 5, & 6

Brooke County Tax maps showing defendnat's railway and land in Brooke County

Exhibit #7

A videotape of defendant's trains in Brooke County during July 1987

Exhibit #8

A U.S. train map, among others

Exhibit #9

A West Virginia map

Exhibit #10

A Norfolk & Western Railway map plotting railroads in 9 states.

As counsel for defendant had not seen these exhibits prior to the hearing, the Court granted additional time for the consideration of objections thereto. By letter dated August 6, 1987, counsel for defendant states that the exhibits are wholly irrelevant, unrelated to issues of hearing loss, and hearsay.

The Court is of the opinion as to the issue of the motion to dismiss that the exhibits are relevant. Further-

more, WVRE 201 and 803 meet the other objections of defendant. Accordingly plaintiffs' Exhibits 1 through 10 will be admitted into evidence for the limited purpose of the motion to dismiss as framed at the July 24, 1987 hearing.

Counsel for the plaintiffs, David Jones, has filed ninety-six (96) cases to date against the defendant, Norfolk & Western Railway Co. Of these actions, thirty-four (34) involve W.Va. Residents, but do not involve any single, fortuitous injuries occurring in West Virginia. Many of the cases concern claims for hearing loss, an area of the law currently under development.

The cases all involve claims made under the authority of the Federal Employer's Liability Act, Title 45 U.S.C.A., § 51.

Counsel for defendant submits that Norfolk & Western is a corporate citizen of Virginia by reason of its incorporation in that State. Its headquarters and principal place of business are located in Roanoke, Virginia. Its corporate officers are employed in Roanoke, Virginia, and reside in Virginia. Defendant Norfolk & Western is a wholly-owned subsidiary of the Norfolk Southern Corporation, which is also incorporated in Virginia.

The injuries alleged in the complaints occurred outside of Brooke County, West Virginia. Likewise, all of the material fact witnesses work and reside outside of Brooke County, West Virginia. Although none of the plaintiffs received medical treatment in Brooke County, a number of the medical experts that will be used will be from the local area, according to the representations made by plaintiffs' counsel at the hearing.

Accordingly, the defendant has moved to dismiss these actions on the basis of the doctrine of forum non convenions. Both parties have more than adequately briefed the applicable law and agree that the controlling decision

in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947). Counsel for the plaintiffs also rely upon the W.Va. decision of *Humphreys v. Newport News*, 10 S.E. 39 (W.Va. 1889) and *Gudelli v. Norfolk & Western Railway Co.*, 125 S.E. 99 (W.Va. 1924).

Counsel for the plaintiffs pointed out to the Court that in the cases at issue the witnesses are spread throughout numerous venues and jurisdictions. He submits that there is no true nexus for any of these actions. Additionally, he submits that where the plaintiffs were injured is literally, in most cases, in the middle of nowhere. Thus, the place where the accident occurred is not relevant. He has, however, suggested that either a voluntary or court-imposed 300 mile radius rule apply. (See Plaintiff's Exhibit No. 9).

Counsel for defendant argues that Brooke County is not the appropriate forum for every F.L.E.A. action against Norfolk & Western. He submits that the appropriate forum in each case is the forum where there is a nexus of residence, transactions, occurrences and witnesses between the plaintiffs and defendant. Thus, he concludes that there are varied appropriate fora for these individual cases.

The scope of the policy decision to be made clearly has implications beyond that of the Circuit Court of Brooke County. It is clear that Brooke County at least was chosen by the plaintiffs due to the ease of access that the Brooke County Circuit Court system provides for legal redress. As counsel for the plaintiffs discussed at the hearing, this Court is fully aware of the conjested court dockets in St. Louis, Missouri, and Chicago, Illinois. Cook County judges have stated that an average case takes four years from the date of filing before any trial date can ever be considered, let alone set. When the average case is usually disposed of within an 18 month period in Brooke County, the attractions, accessi-

bility, and need to establish settlement values in one location is readily understood.

In reference to that policy decision, the obvious consideration to that of Brooke County is one of cost. As these 96 cases would represent a 33% increase in this Court's total caseload, the costs to the Brooke County Circuit Court are easily understood when cardboard file boxes are used for storage for these case files because the Brooke County Commission cannot afford to budget the purchase of additional metal filing cabinets. In reference to the above, the Court can only conclude that some reasonable relationship must be shown so as to maintain an action in Brooke County.

Accordingly, it is

ORDERED:

1. That the actions of the West Virginia plaintiffs, numbering thirty-four (34), may be maintained.

2. That the motion to dismiss will be granted as to the complaints of the non-resident plaintiffs.

To all of which iadverse actions are noted the respective objects of all parties.

ENTERED this 18th day of September, 1987.

/s/ W. Craig Broadwater
Judge

APPENDIX F

Pursuant to Supreme Court Rule 21.1, Petitioner supplies the following list of Respondents:

Smith, Kenneth C.
Thomas, Charles C.
Carter, Raleigh D.
Fisher, Bobby R.
Aker, Bruce Timothy
Grant, Paul Steven
Dickerson, John W.
McCoy, Earnest W.
Wright, Marvin G.
Scruggs, Bobby L.
Wilson, James A.
Mattox, Henry M.
Saunders, Hubert E.
McKee, Carlton L.
Austin, Wayne L.
Hicks, Glen Warren
Kingery, George C.
Elmore, Floyd R.
Johns, Otha David
Kingery, Robert L.
English, John T.
Jones, Bert E.
Horton, Eugene
Neese, David M.
Ellis, James T.
McCoy, Thomas R.
Smith, Fred W.
McCrickard, James D.
Prater, Roger L.
Underwood, Floyd E.
Camper, William F.
Nunley, Carl J.
Robertson, Gerald G.
Coates, James R.
Mullins, Douglas
McGhee, Reed B.
Johnson, Roscoe
Darnell, Gerald W.
Goodman, John R.
Jones, Edward P.
Wyrick, Henry A.
Carter, Raleigh
Jennings, Allen H.
Wilson, Harmon C.
Teats, Frederick E.
Foutz, Roger D.
Jordan, Henry D.
Wimmer, Douglas L.
Camper, Kenneth F.
Whitlow, George W.
Rowe, Dorsey
Stanley, Carl D.
Marcum, Lee Roy
Fluty, Gary Phillip
Lamblin, Flemon R.
Rowe, James
Liles, Tim A.
Hurley, Joe
Harris, Walter W.
Riddle, James E.
Gardner, John E.
Thomas, Frank W.
Smith, Roger D.
Mullins, Morris
Dean, James L.
Adkins, Jack

Smith, Roosevelt
Terry, John A., Jr.
Bishop, Herman L.
Snapp, Raymond L.
Ratcliffe, William
Dye, Homer
Mahon, Edgar
Prince, Robert L.
Williamson, Danny K.
Chaffin, Clyde F.
Chaffins, Brian S.
Thompson, Robert M.
Gresby, Kelly B. Jr.
Martin, Wm. Winfield
Prater, Ernest
Daniels, Elmer
Hatfield, Roger
Long, Carl W.
Marcum, James D.
McGlothin, Orville
Bowen, Paul
Fluty, Elmer R.
Hardin, Boyd A.
Lee, Earl
Cline, Ernest Lee
Marcum, Bobby Lee
Lee, Billie
Short, Robert
Daniels, Harold D.
Looney, Rockford G.
Williams, Michael, Sr.
Workman, Jimmy R.
Belcher, Cecil W.
Coburn, Dennis
Shrewsbury, Gregory
Collins, William D.
Belcher, Robert

APPENDIX G

Pursuant to Supreme Court Rule 28.1, Petitioner provides the following information:

Petitioner Norfolk and Western Railway Company has the following non-wholly-owned subsidiary: The Wabash Railroad Company. Norfolk and Western is a wholly-owned subsidiary of Norfolk Southern Corporation. Norfolk Southern has the following non-wholly-owned subsidiary whose stock is publicly traded: Southern Railway Company. The Southern Railway Company has the following non-wholly-owned subsidiaries: High Point, Randelman, Asheboro and Southern Railroad Company; Mobile and Birmingham Railroad Company; The North Carolina Midland Railroad Company; The South Western Rail Road Company; State University Railroad Company; Yadkin Railroad Company.